74-2281

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 197__

No. A-1325

Supreme Court, U. S.
FILED
SEP 9 1974
MICHAEL RODAK, JR., CLERK

MURRAY TAYLOR,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR WRIT OF CERTIORARI

Allen J. Strawbridge, Jr.
P. O. Box 377
Martin, Tennessee 38237

William R. Neese
402 N. Poplar Street
Paris, Tennessee 38242

Attorneys for Petitioner,
Murray Taylor

TABLE OF CONTENTS

Opinions Below 1

Statement of the Grounds on Which Jurisdiction of this Court is Based 2

Questions Presented 4

Constitutional and Statutory Provisions 5

Statement of the Case 11

Argument 20

Conclusion 35

TABLE OF AUTHORITIES

PAGE

Cases:

Brown v. United States, 411 U.S. 223, 93 S.Ct. _____, 36 L.Ed. 208 (1973) 4, 20, 21, 25, 26, 27

Constitutional Provisions:

Fourth Amendment 5, 34
Fifth Amendment 6, 34

Federal Statutes:

28 USC Sec. 1254 (1) 4

Title 18 USC Sec. 2312 . . . . . 6, 12, 19

Title 18 USC Sec. 2313 . . . . . 7, 12, 19

Title 18 USC Sec. 2314 . . . . . 7, 12, 19

Title 18 USC Sec. 2315 . . 3, 9, 12, 14, 19

Title 18 USC Sec. 371 . . . 10, 12, 13, 19

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 197__

No. A-1325

MURRAY TAYLOR,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

1. Order on Jury Verdict by Trial Court. This Order is unreported and attached hereto as Appendix A.
2. Opinion of the United States Court of Appeals for the Sixth Circuit. This Opinion is unreported and attached hereto as Appendix B.

3. Order of the United States Court of Appeals for the Sixth Circuit Denying Petition to Rehear or to Rehear En Banc. This Order is unreported and attached hereto as Appendix C.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS BASED

Defendant Taylor was indicted by the Federal Grand Jury for the Western District of Tennessee, Eastern Division. At the trial of this cause in the United States District Court, Defendant was convicted of violations of certain Federal statutes and sentenced by the Court. The Defendant timely appealed to the United States Court of Appeals for the Sixth Circuit which

rendered its decision in the cause on May 7, 1974. This decision reversed the conviction for violation of 18 USC Sec. 2315 as charged in Count Four of the indictment and upheld the conviction for conspiracy as charged in Count One of the indictment. Defendant petitioned the Court of Appeals for a Rehearing or a Rehearing En Banc which Petition was denied by Order of the Court of Appeals entered July 5, 1974. On July 25, 1974, the Defendant petitioned the Honorable Potter Stewart, Circuit Justice, for an extension of time within which to file a Petition for Writ of Certiorari. This Petition was granted by Order of Justice Stewart dated July 26, 1974, allowing Petitioner thirty (30) additional days up to and including September 4, 1974.

This Court's jurisdiction to review the aforesaid decision by Writ of Certiorari is conferred by 28 USC Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit erred in its determination that Defendant Taylor was without standing to object to the search of Co-Defendant's premises, thus misinterpreting this Court's decision in Brown v. United States, 411 U.S. 223, 93 S.Ct. _____, 36 L.Ed. 208 (1973) in view of the form and import of Count One of the Indictment and the Trial Court's charge.

2. Whether it is permissible to assume that the improperly admitted evidence relating to the Traxcavator had no significant effect

upon the jury's determination that Defendant Taylor was guilty of conspiracy as charged in Count One of the Indictment beyond a reasonable doubt.

3. Whether the determination of sufficiency of the evidence to support Defendant Taylor's conviction of conspiracy as charged in Count One of the Indictment was based upon a misconception of the evidence by the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution of the United States: Searches and Seizures.--

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fifth Amendment to the Constitution of the United States: Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property.--

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Title 18 United States Code Section 2312:

Transportation of stolen vehicles.--

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been

stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

4. Title 18 United States Code Section 2313:

Sale or Receipt of Stolen Vehicles.--

Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

5. Title 18 United States Code Section 2314:

Transportation of Stolen Goods, Securities, Moneys, Fraudulent State Tax Stamps, or Articles Used in Counterfeiting.--

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or

to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof--

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

6. Title 18 United States Code Section 2315: Sale or Receipt of Stolen Goods, Securities, Moneys, or Fraudulent State Tax Stamps.--

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making,

forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof--

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country.

7. Title 18 United States Code Section 371:

Conspiracy to Commit Offense or to

Defraud United States.--

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT OF THE CASE

On January 10, 1972, a four-count Indictment was returned against Defendant Taylor and three co-defendants, charging them in Count One with willfully and knowingly combining, conspiring and agreeing to transport, receive and conceal stolen property and stolen motor vehicles moving in interstate commerce. Defendant Taylor and Co-Defendant Griffin allegedly committed the overt acts of concealing a stolen Massey Ferguson backhoe. Defendant Taylor was charged in Count Four with receiving and concealing a Caterpillar Traxcavator, which was moving

in interstate commerce, and was charged with knowing the vehicle was stolen. The Indictment reads in pertinent part as follows:

COUNT ONE

On or about the 4th day of October, 1971, and continuing thereafter until on or about the 13th day of January, 1972, in the Western District of Tennessee, Eastern Division,

L. J. GRIFFIN, MURRY TAYLOR, LENDALE HEARN, and DEWEY THOMAS BERRYHILL

did willfully and knowingly combine, conspire, and agree to commit criminal offenses against the United States of America; that is, did agree to transport, receive, and conceal stolen property and stolen motor vehicles moving in interstate commerce; in violation of Title 18, United States Code, Sections 2312, 2313, 2314, and 2315.

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy, and to effect the objects thereof:

1. In October and November, 1971, the precise dates being unknown to the Grand Jury, in the Western District

of Tennessee, Eastern Division, the defendant, MURRAY TAYLOR, did conceal a stolen Massey Ferguson front-end loadster and backhoe, Serial Number 9A 15631.

2. On or about the 10th day of January, 1972, in the Western District of Tennessee, Eastern Division, the defendant, L. J. GRIFFIN, did conceal a stolen Massey Ferguson front-end loadster and backhoe, Serial Number 9A 15631.

3. On or about the 15th day of December, 1971, in the Western District of Tennessee, Eastern Division, the defendant, L. J. GRIFFIN, did conceal a stolen 1971 Honda 350 Motorcycle, VIN 3503002062.

In violation of Title 18, United States Code, Section 371.

nm $10,000., or nm 5 yrs.,
or both

COUNT FOUR

On or about the 12th day of January, 1972, in the Western District of Tennessee, Eastern Division, MURRAY TAYLOR did receive and conceal goods, wares and merchandise, that is, a Caterpillar Traxcavator Model 955K, Serial Number 85J3681, of a value in excess of Five Thousand Dollars

($5,000.00), which was moving as interstate commerce from Gary, Indiana, to Weakley County, Tennessee, and he then knew the same to have been stolen; in violation of Title 18, United States Code, Section 2315.

nm $10,000., or nm 10 yrs., or both

Beginning on January 26, 1973, and ending on February 1, 1973, the case was tried before a jury, upon a plea of not guilty to each count, and the jury found the defendant guilty on both Count One and Count Four.

On February 8, 1973, the defendant was judged by the Court to be guilty as charged in Counts One and Four of the Indictment. On Count One, the Court sentenced the defendant to be imprisoned for one (1) year and one (1) day and to pay a fine of Five Hundred Dollars ($500.00). On Count Four, the Court sentenced the defendant to be imprisoned for one (1) year and one (1)

day and to pay a fine of Five Hundred Dollars ($500.00), said sentences to run concurrently and total fine to be One Thousand Dollars ($1,000.00).

On February 7, 1973, the defendant filed a Motion for a Judgment of Acquittal, or, Alternatively, for a New Trial, and the issues raised on said Motion included those raised on Appeal. The Motion was heard and overruled by the Trial Court on February 14, 1973. Notice of Appeal was filed on February 15, 1973, and the Appeal was otherwise perfected in a timely manner and carried to the United States Court of Appeals for the Sixth Circuit, which remanded in part and affirmed in part.

The evidence shows that on January 12, 1972, a search warrant was issued to search the premises of Defendant Taylor for a

welding machine. The search warrant was executed the same day,and the welder enumerated on the face of the warrant was discovered. Subsequent to the discovery of the welder, a further search uncovered a Caterpillar Traxcavator, Model No. 955K, Serial No. 85J3681. This piece of equipment was the one Defendant Taylor was charged with possessing unlawfully in Count Four of the Indictment.

The Court of Appeals for the Sixth Circuit held the search as described above to be illegal and, therefore, ruled that any evidence obtained as a result thereof is not admissible in a criminal prosecution against Defendant Taylor.

A search warrant was issued on January 10, 1972, for a D-4 Caterpillar

bulldozer, Serial No. 7U42919. This search warrant authorized the search of Co-Defendant L. J. Griffin's premises. Pursuant to this warrant, the officers conducted the search and discovered immediately that the bulldozer was not the one for which they were searching; despite this fact, they continued with an exploratory search. During this exploratory search, the officers discovered a Massey Ferguson backhoe in a shed. (A backhoe is a piece of excavating equipment. It is a tractor fitted with a special mechanical shovel on the rear and a loading scoop on the front.) The officers conducting the search had no knowledge that the backhoe was a stolen piece of equipment, but with some difficulty, they found and recorded the serial number and then left the premises on January 10, 1972. Subsequent investigation revealed that the backhoe was a piece of stolen equipment.

On January 14, 1972, a search warrant was issued, itemizing the aforesaid backhoe and directing that a search be conducted on Co-Defendant Griffin's premises. Though the search warrant on its face indicates that Agent Ancil McDuffee of the Tennessee Bureau of Investigation received information from a reliable source who saw the backhoe on the premises, the testimony revealed that he was in fact his own informant and that the knowledge of the backhoe had come to light only as the result of the illegal search on January 10, 1972. The Sixth Circuit Court of Appeals held both of the above-described searches to be invalid and held that the evidence should have been excluded at the trial, but held that Defendant Taylor had no standing to complain of its admission on Appeal.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The Federal District Court for the Western District of Tennessee, Eastern Division, obtained jurisdiction of the case below by an Indictment returned by the Grand Jury for that District, charging Defendant Taylor with violations of Federal Law allegedly occurring within that District and, more specifically, with violating Title 18 USC Sec. 371 by conspiring to violate Title 18 USC Sec. 2312, 2313, 2314, and 2315, and with the violation of Title 18 USC Sec. 2315.

ARGUMENT

I

The Court of Appeals for the Sixth Circuit has misinterpreted and thus misapplied this Court's decision in Brown v. United States, 411 U.S. 223, 93 S.Ct. 39 L.Ed. 208 (1973), by its failure to distinguish the facts in Brown as opposed to the facts in the case at bar. The Court of Appeals ruled that all searches incident to this Indictment were defective in one or more respects, but stated that Defendant Taylor did not have standing to question the validity of the searches conducted on Co-Defendant Griffin's premises on Appeal.

In the Brown case, this Court refused to make a determination concerning whether or not a co-conspirator had "automatic" standing to object to the search of a

co-defendant's premises, reserving the question for a case where possession at the time of the contested search and seizure was an essential element of the offense charged.

In Brown, supra, possession of the seized evidence at the time of the contested search and seizure was determined immaterial for the reason (1) that the stolen goods seized had been transported and "sold" by the petitioners in that cause before the challenged search and (2) that the Indictment had been carefully limited to the period before the day of the search, thereby eliminating possession as an element of the offense.

In the case at bar, an illegal search took place on January 10, 1972. As a result of this search, the law officers gained the information which was the basis

for the illegal search which took place on January 14, 1972. The Indictment alleges the conspiracy to have continued until January 13, 1972. Furthermore, Co-Defendant Griffin is specifically alleged in Count One of the Indictment to have concealed the backhoe on or about the 10th day of January, 1972.

Not only was the search conducted on Co-Defendant Griffin's premises on January 10, 1972, initially illegal; but it became exploratory in nature. At the time the officers discovered the backhoe in a closed shed, they had no information that it was stolen. The sole basis for the issuance of the warrant for the second search for the backhoe, conducted on January 14, 1972, was the information the officers had procured while on the premises pursuant to the first illegal search.

It is certainly apparent that the search on January 10 was strictly exploratory in nature and intolerable in its intensity and scope. Information gained by these law enforcement officers during the illegal search on January 10 cannot be used in any derivative manner to obtain other evidence. Such evidence is blatantly the "fruit of the poisonous tree."

The evidence actually discovered in the illegal exploratory search conducted on January 10 and later made the basis for the illegal search conducted on January 14 is the only foundation for the involvement of Defendant Taylor in the conspiracy charge of Count One of the Indictment, upon which he still stands convicted. There is not a scintilla of evidence of Defendant Taylor's involvement in any conspiracy except the overt acts concerning the backhoe alleged

in Count One of the Indictment and the evidence which was introduced concerning a Traxcavator in Count Four of the Indictment, Count Four now having been remanded for a new trial.

Not only did Count One of the Indictment and the proof in the case establish possession as an essential element of the crime of conspiracy in this cause, but the Trial Court, in specifically charging in regard to possession, stated that the law recognizes two (2) kinds of possession, i.e., actual possession and constructive possession. The Trial Court instructed the jury that if any defendant had either actual or constructive possession, either alone or jointly, as charged in the Indictment, the possession is joint.

It is respectfully submitted by Defendant Taylor that the Government and

the Trial Court specifically made possession an essential element of the crime charged and sought and obtained a conviction of Defendant Taylor solely on such evidence. The Court of Appeals for the Sixth Circuit held that footnote number four of the Brown opinion implicitly rejects the concept of "constructive possession." This is incorrect. In any event, however, the jury was instructed to apply the law of constructive possession as it pertained to Defendant Taylor and the co-defendants.

The Sixth Circuit Court of Appeals in its opinion implies as pertains to possession (1) that it was an essential element in the Indictment, (2) that it was the basis for the only evidence introduced at trial involving Defendant Taylor in the conspiracy, and (3) that it was given to the jury to deliberate in the Trial Court's

charge. Since the Court of Appeals now says that possession is not to be considered an essential element of the crime for which the defendant was charged and convicted, a prosecutorial self-contradiction exists.

As opposed to the facts in Brown, supra, there is not only present, but completely controlling, the vice of allowing the Government to allege possession as part of the crime charged and yet deny that there was possession sufficient for standing purposes. If the decision of the Sixth Circuit Court of Appeals is allowed to stand, the Government will have been allowed to take full advantage of contradictory positions.

It is very important that the confusion occasioned by the Brown decision be settled. The facts in the case at bar present to this Court the opportunity to

clarify and/or expand Brown in order to shed much needed light on this apparently uncertain area of the law.

II

After holding that the evidence relating to the Traxcavator found in Defendant Taylor's barn should not have been admitted at the trial, the Court of Appeals proceeded to assume that the circumstantial evidence relating to the backhoe was sufficient to sustain Defendant Taylor's conviction on the conspiracy count of the Indictment. It is respectfully contended that such an assumption is not constitutionally permissible on the facts of this case. The entire thrust of the Government's case in the consolidated trial attempted to establish that Defendants Griffin and Hearn were

intimately involved with the theft, transportation, and attempted sale of the Traxcavator.

It is further contended that all the evidence presented in this regard was ill-gotten and came to light only as a result of the search of Taylor's barn which has already been determined to have been illegal. The inference which the Government sought to have the jury draw was that a conspiracy between Griffin, Hearn and Taylor could be shown by their purported mutual involvement with the stolen Traxcavator. True, the charge of illegally possessing the Traxcavator was not made a part of the conspiracy count, but this distinction is one of form merely and has no substance. A cursory reading of the record in this cause leads to the inescapable conclusion that the jury

determined that Co-Defendants Griffin and Hearn transported and attempted to sell the stolen Traxcavator and, after failing to do so, returned it to the farm of their alleged Co-Conspirator Taylor.

The evidence as regards the backhoe is scant at best. There certainly were other equally reasonable inferences to be drawn from that evidence other than that of guilt. Surely, Defendant Taylor is entitled to a new trial on the evidence relating to the backhoe alone, if that evidence is indeed inadmissible. If the Court of Appeals were correct, he will again be convicted of conspiracy, and justice will have been served. If, as we contend, the Court of Appeals were incorrect, he will be acquitted, and justice will have been served. It cannot be the law that a man can be put to trial and have a great amount of damaging

and inculpatory evidence illegally obtained and inadmissibly presented against him and then be denied any effective objection thereto on an intimately related charge. It is respectfully contended that the Court of Appeals has strayed far from the accepted standards of American practice to "assume" that Defendant Taylor would have been convicted without the admission of the vast majority of evidence against him. It should be remembered also that the Trial Court charged the jury that they should return a verdict of guilty if the circumstantial evidence gave rise to the inference of guilt and to "no other equally reasonable inference . . . ," thus depriving Defendant Taylor of the benefit of being proven guilty beyond a reasonable doubt. This is particularly crucial when, as here, the admissible evidence of guilt is so scant.

This is a situation that needs correcting since if the rule applied below becomes the law, there will be small deterrent to policemen who would themselves break the law in their overzealous attempts to feret out crime.

III

Allowing the conviction of conspiracy to stand supported only by the evidence relating to the backhoe cries out the more for correction when it is realized that the Court of Appeals in reaching this conclusion relied upon "facts" that were never directly or indirectly admitted into evidence, legally or illegally. The Court states that Defendant Taylor lived on a farm some three (3) miles from the farm of Defendant Griffin. No testimony was at any

time introduced which touched upon this matter, and it could be shown that the farms are well over twenty (20) miles apart. The Court of Appeals in recounting evidence which it considered sufficient to support a conviction further stated that several witnesses testified that Taylor had had in his possession "the same piece of equipment" discovered on Griffin's farm. No such testimony is in the record. The strongest testimony mustered by the Government was that the two (2) pieces of equipment were similar, that the identifying marks were characteristic of that type of equipment, and that there were differences in the two (2) backhoes.

The Court of Appeals stated that the backhoe was in Arkansas in late December, 1971; and,therefore, it could have been the one seen on Defendant Taylor's farm in

October, 1971. No such testimony is in the record. The Government's witnesses in fact placed the backhoe is Arkansas in October, 1971, making it impossible for Taylor to have possessed the stolen backhoe since the backhoe he had was in his possession in October. The Court of Appeals stated that when Defendant Taylor retrieved a backhoe from a neighbor, Taylor said that he had to deliver it to someone else. The Court inferred that it was to be delivered to a co-defendant. That same neighbor, however, also testified that the backhoe was loaned to him again a short time thereafter.

It is clear, therefore, that the Court of Appeals misapprehended the evidence as presented in the record and as a result determined that sufficient evidence existed to warrant a conviction. It is respectfully

submitted to this Court that had the illegal and inadmissible evidence been kept from the jury as the law requires, a verdict of guilty would be difficult to imagine. These errors in understanding and interpreting the evidence should be corrected since the Court of Appeals has departed from accepted standards and since a simple and readily available method exists to determine the matter. The case should be remanded for a new trial so that all the legal and admissible evidence in this case might go to the jury for its consideration without the taint of evidence illegally obtained in clear controvention of the Fourth and Fifth Amendments to the Constitution of the United States.

CONCLUSION

For the reasons set out above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Allen J. Strawbridge,Jr.
P. O. Box 377
Martin, Tennessee 38237

William R. Neese
402 N. Poplar Street
Paris, Tennessee 38242

Attorneys for Petitioner,
Murray Taylor

September, 1974

AFFIDAVIT OF SERVICE

I, William R. Neese, attorney for Petitioner, Murray Taylor, make oath that I have served the foregoing Petition for Writ of Certiorari upon the United States, being the only party upon which service is required, by depositing three copies thereof in the United States mails, airmail postage prepaid and addressed to Solicitor General, Department of Justice, Washington, D.C., 20530, and by depositing three copies thereof in the United States mails first class postage prepaid and addressed to Honorable Glen Reid, Jr., Assistant U.S. Attorney, 1058 Federal Office Building, Memphis, Tennessee, 38103.

This the 3rd day of September, 1974.

William R. Neese

William R. Neese

STATE OF TENNESSEE
COUNTY OF HENRY

Sworn to and subscribed before me this the 3rd day of September, 1974.

MARVIN MORTON NOTARY PUBLIC AT LARGE STATE OF TENNESSEE

Marvin Morton

My commission expires 18 March 1975.

74-2281

Supreme Court, U. S.
FILED
SEP 3 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 197__

No. A-1325

MURRAY TAYLOR,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

A P P E N D I X

ORDER ON JURY VERDICT

(Filed February 2, 1973)

This cause came on to be heard the 26th day of January, 1973, the United States Attorney for this District representing the Government, and the defendant, MURRAY TAYLOR, appeared in person and with counsel, Allen J. Strawbridge, Jr., Esq., and William Neese, Esq.

Upon announcement of ready for trial on the NOT GUILTY plea of the defendant, a jury was called, qualified, tried and sworn to well and truly try the issues therein joined and a true verdict render according to the law and evidence. On February 1, 1973, the jury having heard all the evidence, listened to arguments of counsel and having received the charge of the Court, retired to consider its verdict and after due deliberation on February 2, 1973, returned into open Court and reported for its verdict that it found the defendant GUILTY as charged in Counts I and IV of the indictment.

The case is set for disposition on Wednesday, February 7, 1973, and in the meantime, defendant may stand on present bond.

HARRY W. WELLFORD
UNITED STATES DISTRICT JUDGE

APPROVED:

GLEN REID, JR.
Assistant United States Attorney

No. 73-1603
No. 73-1604

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. LENDALE HEARN AND MURRAY TAYLOR, *Defendants-Appellants.*	ON APPEAL from the United States District Court for the Western District of Tennessee, Eastern Division.

Decided and Filed May 7, 1974.

Before: CELEBREZZE, Circuit Judge, MCALLISTER, Senior Circuit Judge, and WILSON, District Judge.*

WILSON, District Judge. Lendale Hearn and Murray Taylor were convicted of having engaged in a criminal conspiracy to receive and conceal stolen goods moving in interstate commerce in violation of 18 U.S.C. § 371. In addition, Taylor was convicted of the substantive offense of receiving and concealing stolen goods moving in interstate commerce in violation of 18 U.S.C. § 2315. Hearn received a three year sentence, with all but six months having been suspended, and with 30 months probation to follow. Taylor received two concurrent sentences of a year and a day, together with a fine of $500.00 upon each of the two counts upon which he was convicted. The principal contentions of error made by

---

* The Honorable Frank W. Wilson, Chief Judge, U. S. District Court for the Eastern District of Tennessee, sitting by designation.

each appellant in these appeals, which have been consolidated for hearing, center around the admissibility of evidence obtained in the course of certain searches and seizures and the sufficiency of the evidence to warrant their respective convictions.

The record upon these appeals reflects that the appellants were indicted jointly with two other individuals, L. J. Griffin and Dewey Berryhill, in a four-count indictment. The first count charged all four defendants with having engaged in a conspiracy to transport, receive and conceal stolen property and stolen motor vehicles moving in interstate commerce. The second and third counts charged the co-defendant Griffin with the substantive offense of receiving and concealing stolen property moving in interstate commerce. The fourth count charged the appellant Taylor with the substantive offense of receiving and concealing stolen property moving in interstate commerce. Upon the trial of the case the jury found Hearn, Taylor and Griffin guilty upon the conspiracy count but acquitted the co-defendant Berryhill on that count. In addition, Griffin was found guilty upon the second and third counts and Taylor was found guilty upon the fourth count. No appeal was taken by the co-defendant Griffin in regard to his convictions.

The appellants, Hearn and Taylor, contend, among other matters, that the evidence was insufficient to support their respective convictions. The settled rule, in this regard, is that in reviewing the sufficiency of the evidence to support a conviction this Court ". . . cannot weigh the evidence but we must take the view of it, and the inferences reasonably and justifiably to be drawn from it, most favorable to the Government and determine therefrom whether a verdict against the appellant might have been lawfully rendered . . ." *United States* v. *Wolfenbarger*, 426 F.2d 992 (6th Cir. 1970).

When all reasonable inferences are accorded and the evidence is viewed in the light most favorable to the Government, the jury could have found the following facts, having ref-

erence to the charges in the first count of the indictment, to have been established beyond a reasonable doubt. Sometime during the evening of Sunday, October 3, 1971, a Model #2200 Massey-Ferguson tractor, having a front end loader on one end and a backhoe on the other and having a value of $5,500.00 (which equipment will hereinafter be referred to simply as a backhoe), was stolen from the premises of its owner, the McBride Construction Company, in Paris, Tennessee. The backhoe, which was painted yellow and had certain distinctive features, including plastic sleeves placed over the hydraulic lines by the owner to afford additional protection to those lines, was loaded at the time of the theft upon a yellow 3-axle metal trailer, which in turn was hitched to a yellow truck. All three pieces of equipment were stolen upon the occasion of October 3, 1971.

Sometime during the first part of October, 1971, the defendant Hearn, accompanied by the co-defendant Berryhill, was observed driving a truck and trailer loaded with a backhoe, all of the equipment being of the same description as the stolen equipment, in Weakley County, Tennessee, which adjoins Henry County where Paris, Tennessee is located. Upon this occasion the defendant Hearn was observed making a delivery of the backhoe to the co-defendant Griffin at his farm in Weakley County, Tennessee. Hearn and Griffin conversed for some 30 minutes at the time of this delivery and then Hearn left, driving the truck and trailer, but leaving the backhoe with Griffin. About a week after the theft occurred, the truck and trailer were discovered abandoned along the highway in Weakley County, Tennessee, and were returned to their owner.

The defendant Taylor also lived on a farm in Weakley County, Tennessee, his farm being some three miles from the farm of the defendant Griffin. During the months of October and November 1971, Taylor was observed to have on his farm a backhoe of the same make, model and description, and having the same distinctive features as the stolen back-

hoe. He told an acquaintance that he had obtained the backhoe from a certain individual. Upon the trial that individual denied the statement. During the time that Taylor had the backhoe he allowed a neighbor to use it. Several persons who observed the backhoe on this occasion testified that it was the same piece of equipment as the backhoe that they inspected at the McBride Construction Company when the stolen backhoe was recovered. When Taylor retrieved the backhoe from his neighbor, he stated that he had to deliver it to someone else. In February of 1972, after the stolen backhoe had been recovered, Taylor was interviewed by the F.B.I. and denied that he had ever had a backhoe in his possession or on his farm.

In late December 1971, the defendant Griffin delivered the backhoe to an equipment dealer in Marion, Arkansas, with instructions that he rent it or sell it for him. On this occasion, Griffin quoted such a low price on the equipment that the dealer asked if it were "hot," to which Griffin replied, "It may be a little warm." In another conversation Griffin advised the dealer that he would get rid of the backhoe "if I have to run it off in the river."

On January 8, 1972, Griffin picked up the backhoe in Marion, Arkansas, and transported it back to his farm in Weakley County, Tennessee. On January 14, 1972, the backhoe was found in a tool shed on Griffin's farm by local law enforcement officers in the course of a search of the premises.

In addition to the foregoing evidence regarding the backhoe, evidence was introduced in regard to a motorcycle referred to in one of the overt acts alleged in the conspiracy count. That evidence reflected that a Honda motorcycle, bearing a certain identification number, was stolen in LaFayette, Louisiana, on a date believed by the owner to have been in about October of 1971. The defendant Hearn was shown to have returned from the vicinity of LaFayette, Louisiana, to Weakley County, Tennessee, in an enclosed truck during the latter part of September of 1971. In December of 1971 Grif-

fin traded the Honda for another piece of equipment at a motorcycle shop in Union City, Tennessee.

The fourth count of the indictment charged the appellant Taylor with the substantive offense of receiving and concealing a stolen traxcavator moving in interstate commerce. When the evidence in regard to this count is viewed in a light most favorable to the Government, the jury could find the following facts to have been established beyond a reasonable doubt. Upon March 17, 1971, a new Caterpillar traxcavator, Model No. 955K, bearing a certain identification number and having a value of $31,000 was stolen from the S & W Construction Company in Memphis, Tennessee. Upon October 15, 1971, the traxcavator was recovered by the police in Gary, Indiana. Two days later the traxcavator was again stolen, this time from the lot where the police had stored the equipment. Upon January 12, 1972, the traxcavator was located in a barn upon the farm of the appellant Taylor in Weakley County, Tennessee, during the course of a search of the premises by local law enforcement officers. Bales of hay had been placed around the traxcavator to conceal its presence in the barn. Taylor had purchased the hay some months previous to feed two horses which he kept in the barn lot. When shown the traxcavator following its discovery, Taylor remarked to the officers, "You wouldn't believe that somebody could put this in my barn and me not know it."

Upon the foregoing state of the record it is clear that sufficient evidence exists to support the verdict as to both Hearn and Taylor upon the conspiracy count. It is contended that evidence of a conspiratorial agreement is lacking. While the evidence may be insufficient to establish a conspiratorial agreement regarding the transportation of the motorcycle, there is a clear sufficiency of the evidence to establish a conspiratorial agreement regarding the receiving and concealing of the backhoe. It is not necessary that the proof establish a formal agreement in this regard. It is sufficient if the unlawful agreement may be inferred from all of the

circumstances. As stated by this Court in the case of *Polifico* v. *United States*, 237 F.2d 97, 104 (6th Cir. 1956):

> "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a development and collocation of circumstances."

It is likewise clear that the evidence is sufficient to support the jury verdict finding the appellant Taylor guilty of receiving and concealing the traxcavator as charged in the fourth count of the indictment.

However, with respect to each of the foregoing counts it is contended by the appellants that evidence obtained as a result of an unlawful search was improperly admitted in the course of their trial, and that the verdict was rendered invalid accordingly. Regarding the conspiracy count, it is contended that the trial court was in error in failing to sustain the motion of each defendant seeking to suppress evidence obtained as a result of the search of the co-defendant Griffin's farm, which search led to the discovery of the backhoe in his tool shed. Regarding the fourth count, it is contended that the trial court was in error in failing to sustain the motion of the defendant Taylor to suppress evidence obtained as a result of a search leading to the discovery of the traxcavator in his barn. This Court must accordingly turn its attention to these contentions.

With respect to the search which led to the discovery of the stolen backhoe in the tool shed of the co-defendant Griffin, certain additional facts become relevant. As previously noted, upon January 8, 1972, Griffin returned the backhoe from Marion, Arkansas, to Weakley County, Tennessee. There was also evidence in the record which would reflect that upon the same weekend Griffin stole a Model B-4 Caterpillar Bulldozer from the dealer in Marion, Arkansas, and transported it to Weakley County, Tennessee, where he concealed it on an abandoned farm near his home, a matter for which he was

convicted as charged in the second count of the indictment. When local law enforcement officers received information regarding the theft of the bulldozer, they obtained a warrant to search the Griffin farm for it. In the course of an unsuccessful search for the bulldozer, they discovered a backhoe in the tool shed and secured its identification number. Using this means to confirm that the backhoe was stolen, they obtained a search warrant and returned to the premises and seized the backhoe, which was the stolen equipment referred to in the conspiracy count.

It appears, however, as asserted by the appellants, that each of the above referred to search warrants was defective in one or more respects, including the fact that they each recited that the information contained therein had been obtained from an informant whose identity was not stated and whose reliability was not reflected so as to enable the magistrate to form a judicial opinion thereon, all as required by *Aguilar* v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli* v. *United States*, 394 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

In response to this contention, it is the position of the Government that the appellants had no interest in the premises where the backhoe was found, and therefore have no standing to question the legality of the search of those premises. It is true, as contended by the Government, that neither Hearn nor Taylor has ever asserted any interest in the backhoe or in the Griffin premises that were searched.

It is well settled, of course, that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Alderman* v. *United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). In order to have standing to object to an unlawful search, a person must have been the victim of the unlawful search. That is, he must have been the person against whom the search was directed, as distinguished from one who claims prejudice

only through the use of evidence gathered as a consequence of a search directed at another.

As a basis for asserting the right to object to the search of Griffin's premises, the appellants make two contentions. Relying upon *McDonald* v. *United States*, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed 153 (1948), they assert that if one co-defendant has standing to challenge an unlawful search, all other co-defendants likewise have standing. Relying upon *Jones* v. *United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1968), they assert that where possession is an essential element of the offense charged, all defendants charged with such possession have standing to challenge an unlawful search regardless of any lack of personal interest in the premises searched or the property seized.

The foregoing general propositions are not, however, an accurate statement of the present law. Any bases for drawing such general propositions of law from the cases of *McDonald* v. *United States, supra* and *Jones* v. *United States, supra*, have been largely, if not wholly, removed by the later cases of *Alderman* v. *United States*, 394 U.S. 165, 173 n. 7, 89 S.Ct. 961, 22 L.Ed.2d 176, 186 n. 7 (1968) (limiting the automatic standing rule of *McDonald* to guests "on the premises searched") and *Simmons* v. *United States*, 392 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) (forbidding the use upon trial of pretrial admissions against interest made to achieve Fourth Amendment standing in a motion to suppress evidence, thereby removing much of the rationale for the automatic standing rule enunciated in *Jones* v. *United States*).

Furthermore, the present case, involving as it does co-defendants to a conspiracy charge seeking to assert Fourth Amendment standing through a co-conspirator, would come within the rules only recently laid down in the case of *Brown* v. *United States*, 411 U.S. 223, 93 S.Ct. —, 36 L.Ed.2d 208 (1973). In *Brown* two defendants were convicted of conspiring with a third to transport stolen goods in interstate commerce. Evidence obtained from an unlawful search of

the co-conspirator's premises was admitted in the separate trial of the other two defendants. Concluding that no error was made in thus admitting the evidence as to the two defendants who "failed to allege any legitimate interest of any kind in the premises searched or the merchandise seized," the Court stated:

> ". . . [T]here is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) had no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure . . ." 411 U.S. at 36 L.Ed.2d at 214.

The appellants seek to avoid the rules laid down in *Brown* and maintain standing to assert Fourth Amendment rights with regard to the search of their co-defendant's premises both by distinguishing the facts in *Brown* from the present case and by asserting that possession at the time of the search was an essential element of the offense with which they were charged and convicted.

In seeking to distinguish *Brown* they assert that no prior illegal search was there involved, that, unlike the present case, the conspiracy charged was limited to a date prior to the date of the search under attack and that the offense charged in *Brown* was a conspiracy to transport, and not a conspiracy to receive and conceal, the contention here being that, unlike *Brown*, possession is an essential element of the offense for which the appellants were charged and convicted. These distinctions, however, are of no avail. The appellants would no more have standing to complain of a prior search of the Griffin premises than they would to complain of the search under attack. All other attempted distinctions are predicated either upon the assumption that a co-conspirator's claim of

constructive possession is sufficient to accord him standing, an invalid assumption and one implicitly rejected in footnote number 4 of the *Brown* opinion, or upon the assumption that possession at the time of seizure is an essential element of the crime of conspiracy to receive and conceal, an invalid legal deduction. Possession, on the day of seizure or otherwise, is not an essential element of the crime of conspiracy to receive and conceal. The crime of conspiracy is not the same as the substantive crime which is the objective of the conspiracy. The gist of the crime of conspiracy to receive and conceal is the unlawful *agreement* to receive and conceal, accompanied by one or more acts in furtherance of the unlawful *agreement*. *United States* v. *Ketola*, 455 F.2d 83, 85 (9th Cir. 1972).

Applying the rules laid down in *Brown* v. *United States*, *supra*, to the facts of this case, the appellants were without standing to object to the search of their co-defendant's premises and the evidence obtained as a result of the search was properly admitted as to them.

Turning to the contention of the appellant Taylor that the trial court was in error in failing to suppress evidence obtained as a result of the search leading to the discovery of the traxcavator in his barn, certain facts additional to those heretofore stated become relevant. Upon January 12, 1972, local law enforcement officers obtained a state warrant to search the defendant Taylor's premises for a stolen Hobart Welder. Having located the welder at one outbuilding, they continued the search by going to a barn some 150 yards away where they located the traxcavator concealed behind bales of hay. Taylor was not present on the farm at the time of this search. He returned shortly thereafter, however, and was told by the officers of their seizure of the stolen welder. A warrant of arrest having been procured in the meanwhile by one of the officers, Taylor was advised of his arrest and of his constitutional rights in regard thereto. Without disclosing their prior search of his barn, the officers then proceeded to interrogate Taylor regarding the traxcavator. Although there is

some variance in the testimony at this point, the following testimony of one of the officers is representative of that which occurred:

> "The best I remember, one of us asked him about the caterpillar and he said that he didn't know anything about a caterpillar being in the barn, that he put that hay in there some time ago, six or eight months, and had not been back in that barn since that time and knew nothing about it. So I believe I made the statement to him then: 'Well, Mr. Taylor, we don't want to charge you with anything that you don't know anything about, so let's go look at it.'"

In response to this, Taylor said, "Well, let's go see it." With Taylor leading the way, he and the officers then went to the barn. Upon observing the traxcavator concealed behind the hay, Taylor remarked, "You wouldn't believe that somebody could put this in my barn and me not know it." At no time during these proceedings was Taylor physically restrained in any manner. After the traxcavator was "discovered," he was permitted to go on his way and turn himself in at the jail later in the day.

Since the search warrant for the Hobart Welder was defective in that it, too, failed to provide adequate facts in regard to the reliability of the informer, as required by *Aguilar* v. *Texas, supra,* and *Spinelli* v. *United States, supra,* and since it is clear that the continuation of the search after location of the Hobart Welder did not comport with constitutional standards, *Marron* v. *United States,* 275 U.S. 192, 48 S.Ct. 741, 72 L.Ed. 231 (1927); *Coolidge* v. *New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), the admission of evidence concerning the location and discovery of the traxcavator can only be supported upon the theory that Taylor's statements and actions in going to the barn rendered the search on that occasion a consential one.

The trial court found the search to have been a consential one. Before this finding can be overruled, it must be found to have been clearly erroneous. *See United States* v. *Rose*, 415 F.2d 742 (6th Cir. 1969), *cert. denied*, 396 U.S. 971, 24 L.Ed.2d 438, 90 S.Ct. 458 (1969).

It has long been recognized that consential searches are "reasonable" and thus may lawfully be made without a search warrant. Nor does a prior unlawful search render evidence obtained by a subsequent consential search inadmissible, *United States* v. *Willis*, 473 F.2d 450 (6th Cir. 1973), although, as shall be shortly noted, the use of unlawfully obtained information in procuring consent is a relevant fact to consider in determining the voluntary nature of the consent.

The guidelines for testing the validity of a search asserted to have been made with the consent of the accused are those set forth in the recent cas of *Schneckloth* v. *Bustamonte*, — U.S. —, 93 S.Ct. —, 36 L.Ed.2d 854 (1973). As stated by the Court in that case: "The constitutional question in the present case concerns the definition of 'consent' in the Fourth and Fourteenth Amendments context." Starting with the premises that "when a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given," — U.S. at —, 36 L.Ed2d at 860, the Supreme Court rejected the theory that to establish "consent" the prosecution must establish a constitutional "waiver," that is, "an intentional relinquishment or abandonment of a known right or privilege." Rather, the Court concluded that "voluntariness is a question of fact to be determined from the totality of all the circumstances . . ." and "it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced. It is this careful sifting of the unique facts and circumstances of each case that is evidenced in our prior decisions involving consent searches." — U.S. at —, 36 L.Ed.2d at 866.

Thus, the presence or absence of a single consential or

coercive factor is not of itself controlling as a matter of law. As illustratively pointed out by the Court:

> "Some of the factors taken into account have included the youth of the accused . . . his lack of education . . . or his low intelligence; . . . the lack of any advice to the accused of his constitutional rights, . . . the length of detention . . . the repeated and prolonged nature of the questioning . . . and the use of physical punishment, such as the deprivation of food or sleep . . . In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted." (Citations omitted) — U.S. at —, 36 L.Ed.2d at 867.

Applying the guidelines in *Schneckloth* v. *Bustamonte* to the facts of the present case, the factors tending to establish a voluntary and uncoerced consent on the part of the appellant Taylor to the search of his premises include: (a) his having been initially given his *Miranda* advice of rights incident to his arrest on the stolen welder charge; (b) his continued freedom of movement and the lack of any physical restraint incident to his arrest upon the stolen welder charge; (c) his presence on his own farm and in familiar surroundings; (d) his acquiesence in the officer's suggestion to "go look at it" (*i. e.*, the traxcavator) and his affirmative response, "Well, let's go see it"; and (e) his leading the way to the barn and in mounting the bales of hay in advance of the others.

Upon the other hand, factors tending to establish an involuntary and coercive consent search include: (a) the presence of three law enforcement officers on his farm; (b) his initial arrest upon the stolen welder charge; (c) the suggestion by the officers that the barn be inspected for the presence of the traxcavator; (d) the use by the officers of information gained by a prior unlawful search as the predicate for their suggestion that the barn be inspected for the presence of the traxcavator; and (e) the absence of any warning to

the appellant that he had a constitutional right to refuse to consent to a search of the ... All of this ... would indicate to this Court that the coercive factors, though some of them are subtle and implicit, would nevertheless substantially outweigh the non-coercive ones. As stated in the *Schneckloth* case:

> "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." — U.S. at —, 36 L.Ed.2d at 864.

Bearing in mind that consent must be proved by "clear and positive testimony," *Amos* v. *United States*, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654 (1921), and "must be unequivocal, specific, and intelligently given, uncontaminated by any duress or coercion," *Simmons* v. *Bomar*, 349 F.2d 365 (6th Cir. 1965), this Court is of the opinion that such consent as was here involved was not "freely and voluntarily" given and that the conclusion of the trial court to the contrary was clearly erroneous. *See Bumper* v. *North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968) (consent held invalid where given on officer's representation that he had a search warrant). *See also Villano* v. *United States*, 310 F.2d 680 (10th Cir. 1962) *citing United States* v. *Page*, 302 F.2d 81 (9th Cir. 1962) ("The Government's burden is greater where consent is claimed to have been given while the defendant is under arrest").

Furthermore, under the facts of this case, the same result would be required by the application of the legal principle that information gained by law enforcement officers during an illegal search cannot be used in a derivative manner to obtain other evidence, the so-called "fruit of the poisonous tree" doctrine. *See Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); *Nardone* v. *United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939). *See*

also Fike v. *United States*, 449 F.2d 191 (5th Cir. 1971); *United States* v. *Brandon*, 467 F.2d 1008 (9th Cir. 1972); *United States* v. *Cole*, 463 F.2d 163 (2nd Cir. 1972).

Other matters of less import are complained of by the appellants. These have been considered by this Court and are found to be without merit.

The conviction of each appellant upon Count I of the indictment (conspiracy) will be affirmed. The conviction of the appellant Taylor upon Court IV of the indictment (receiving and concealing) will be set aside and a new trial granted upon that count.

No. 73-1604

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

v. : ORDER

MURRAY TAYLOR, :

Defendant-Appellant. :

Before: CELEBREZZE, Circuit Judge, McALLISTER, Senior Circuit Judge, and WILSON,* District Judge.

Appellant having filed a petition for rehearing with the suggestion that it be heard en banc, and no judge of this court having moved for a rehearing en banc, the petition to rehear has been referred to the hearing panel.

Upon consideration, the court being advised, it is ORDERED that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Helman
Clerk

*The Honorable Frank W. Wilson, Chief Judge, U. S. District Court, for the Eastern District of Tennessee, sitting by designation.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-1325

MURRAY TAYLOR,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 4, 1974.

/s/ Potter Stewart
Associate Justice of the
Supreme Court of the
United States

Dated this 26th
day of July, 1974.

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-228

MURRAY TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

NO. 74-5285

LENDALE HEARN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that there was insufficient evidence to sustain their convictions and that unlawfully seized evidence was used against them.

After a jury trial in the United States District Court for the Western District of Tennessee, petitioners were convicted, together with L. J. Griffin, of conspiring to transport, receive and conceal stolen property moving in interstate commerce, in violation of 18 U.S.C. 2314, 2315 and 371; petitioner Taylor was also convicted of one,

and co-defendant Griffin of two, substantive counts of receiving and concealing stolen property transported interstate, in violation of 18 U.S.C. 2315. Taylor was sentenced to concurrent terms of imprisonment of one year and one day and was fined $500 on each count; Hearn was sentenced to a term of three years' imprisonment with all but six months suspended in favor of probation.[1] The court of appeals reversed Taylor's conviction on the substantive count because of an unlawful search and seizure, but affirmed his and Hearn's conviction on the conspiracy count (Pet. App. B).[2]

1. The evidence showed that shortly after a Massey-Ferguson tractor, having a front-end loader and back hoe, was stolen from a construction company in Paris, Tennessee, petitioner Hearn delivered the tractor to Griffin at the latter's farm in the adjacent county in Tennessee (A. 48b-57b),[3] using the truck and trailer that had also been stolen from the construction company and which were subsequently found abandoned (Tr. 111-112). Hearn and Griffin were seen conversing for approximately one-half hour after the tractor was unloaded, but the subject of their conversation is unknown (A. 56b-57b). The tractor was thereafter seen on petitioner Taylor's farm, which is in the same county as Griffin's farm (A. 63b-67b); Taylor loaned it to a neighbor, and told a false story concerning the source from which he acquired it (A. 67b-69b). Taylor later stated that he had to move the tractor so that it

---

[1]Griffin, who did not appeal, received concurrent sentences of three years' imprisonment on each count. A fourth defendant, Dewey Berryhill, was acquitted on the conspiracy charge.

[2]"Pet. App." refers to the appendix to Taylor's petition for a writ of certiorari (No. 74-228).

[3]"A." refers to the appendix in the court of appeals; "Tr." refers to the trial transcript.

could be delivered to someone else (A. 79b-80b). Two months after Griffin acquired the tractor he transported it to Marion, Arkansas, where he had it repaired and attempted to sell or lease it (A. 81b, 96b-98b, 105b; Tr. 313-317). One month later he brought it back to his farm in Tennessee (A. 83b, 98b-99b), where it was discovered by an agent of the Tennessee Bureau of Criminal Investigation (A. 132b).

a. Petitioner Taylor argues that the evidence was insufficient to sustain his conviction because the government could show only that the tractor he had on his farm was similar to the stolen tractor recovered from Griffin, not that it was "the same piece of equipment" (Taylor Pet. 32), and because government witnesses placed the tractor in Arkansas in October, the same time that he had a tractor on his farm, thus precluding the possibility that the two tractors were the same (Taylor Pet. 33). The evidence showed, however, that Griffin transported the tractor to Arkansas in December, not in October when a tractor was seen in Taylor's possession (A. 97b, 105b). Witnesses who saw the tractor both while it was in Taylor's possession and after it was recovered and returned to its owner testified that on both occasions they observed the same peculiarities in the equipment (A. 69b-82b, 96b-97b). From this testimony the jury could infer that the witnesses had seen the same piece of equipment on both occasions. Additional evidence of Taylor's guilt was provided by the false story he gave concerning its source, when lending the tractor to a neighbor, as well as by his false denials to state and federal agents that he had ever owned or possessed a tractor or lent one to a neighbor (A. 58b-59b, 150b-151b).

b. Petitioner Hearn, while conceding that the evidence was sufficient to establish that the tractor that he delivered to Griffin was stolen and that he was the thief and hence knew it was stolen, nevertheless argues that his mere knowing delivery of stolen equipment was insufficient to support a reasonable inference that a conspiratorial agreement existed (Hearn Pet. 15-16). The transfer of stolen property from one person who knows it is stolen to another who also has that knowledge is, however, sufficient to evidence an unlawful agreement between the two to receive such property. This is not a case like *United States* v. *Shiver*, 414 F. 2d 461 (C.A. 5), on which petitioner relies (Hearn Pet. 16), where the underlying theft was not established by competent evidence.

2. The tractor was seized from a shed on Griffin's farm by Tennessee Bureau of Criminal Investgation agents executing a search warrant that the court of appeals found to be defective (Pet. App. B 7). The court nevertheless properly held *(id.* at 8-9) that petitioners lacked standing to challenge the search and seizure because as in *Brown* v. *United States*, 411 U.S. 223, they (1) were not on the premises at the time of the search and seizure; (2) alleged no proprietary or possessory interest in the premises; and (3) were not charged with an offense that included, as an essential element, possession by them of the tractor at the time of the search and seizure. See *id.* at 229, 230, n. 4. There is no merit to petitioners' argument that *Brown* applies only where the person subjected to an unlawful search is tried separately from his co-defendants. The person subjected to search was tried separately in *Brown* because his pretrial motion to suppress was granted; a joint trial, at which the evidence was admitted only against his co-defendants, might have been prejudicial to him even if a limiting in-

struction were given. Here, the evidence was admissible against petitioners and only Griffin—who did not appeal—could have been prejudiced by its introduction at the joint trial.

Nor are petitioners aided by *McDonald* v. *United States*, 335 U.S. 451, 456, assuming *arguendo* that the rule of that case can be said to have survived *Brown* (cf. *Alderman* v. *United States*, 394 U.S. 165, 173, n. 7). In *McDonald* the seized evidence "would not have been available for use at the trial" if the motion to suppress had been granted, since it constituted personal property of the co-defendant and would have had to have been returned to him. 335 U.S. at 456. Here, the seized evidence, being stolen property, would have been returned to its owner rather than to Griffin if the motion to suppress had been granted, and hence would have been available for use at trial.

3. Taylor's conviction reversed by the court of appeals for violation of 18 U.S.C. 2315 was based upon his possession and concealment of a Caterpillar Traxcavator; unlike concealment of the tractor, concealment of the traxcavator was not charged as an overt act in the conspiracy count. Taylor nevertheless argues (Taylor Pet. 29-30) that the prejudice from the admission of evidence concerning the traxcavator tainted his conviction on the conspiracy count. The purpose of the suppression rule—*i.e.*, vindication of the prohibition against illegal searches and seizures—was, however, fully served by the court of appeals' reversal of Taylor's conviction on the only count on which evidence concerning the traxcavator was admitted. The trial court repeatedly and carefully instructed the jury that each count of the indictment was to be considered separately (A. 166b-167b, 168b, 173b, 174b, 175b).

Contrary to Taylor's assertion (Taylor Pet. 27-29), the government made no effort at trial to implicate Griffin and Hearn in the theft and transportation of the traxcavator. Rather, the government showed only that it was stolen and transported interstate by persons unknown, and was thereafter discovered concealed on Taylor's farm. Moreover, any prejudicial effect that evidence concerning the traxcavator may have had on the jury's consideration of the conspiracy count did not arise from the unlawful search for and seizure of the equipment, but rather from the fact that two counts charging separate and distinct transactions were tried together. Taylor's proper remedy, therefore, would have been a pretrial motion for severance—a motion that he failed to make.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

DOJ-1974-11